

House Bill 379 (AS PASSED HOUSE AND SENATE)

By: Representative O'Neal of the 146th

A BILL TO BE ENTITLED
AN ACT

To amend Article 2 of Chapter 7 of Title 48 of the Official Code of Georgia Annotated, relating to imposition, rate, computation and exemption regarding income taxes, so as to define certain terms; to disallow expenses paid to certain real estate investment trusts; to provide for procedures, conditions, and limitations; to provide an effective date; to provide for applicability; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Article 2 of Chapter 7 of Title 48 of the Official Code of Georgia Annotated, relating to imposition, rate, computation and exemption regarding income taxes, is amended in subsection (b) of Code Section 48-7-21, relating to taxation of corporations, by adding a new paragraph to read as follows:

"(16) Georgia taxable income shall be adjusted as provided in Code Section 48-7-28.4."

SECTION 2.

Said article is further amended in subsection (b) of Code Section 48-7-27, relating to computation of taxable net income, by adding a new paragraph to read as follows:

"(13) Georgia taxable income shall be adjusted as provided in Code Section 48-7-28.4."

SECTION 3.

Said article is further amended by adding a new Code section to read as follows:

"48-7-28.4.

(a) As used in this Code section, the term:

(1) 'Association taxable as a corporation', for purposes of paragraph (2) of this subsection, does not include:

(A) A real estate investment trust as defined in this Code section, other than a 'captive real estate investment trust';

(B) Any qualified real estate investment trust subsidiary under Section 856(i) of the Internal Revenue Code of 1986, as amended, other than a qualified REIT subsidiary of a 'captive real estate investment trust';

(C) Any Listed Australian Property Trust, meaning an Australian unit trust registered as a 'Managed Investment Scheme' under the Australian Corporations Act in which the principal class of units is listed on a recognized stock exchange in Australia and is regularly traded on an established securities market, or an entity organized as a trust, provided that a Listed Australian Property Trust owns or controls, directly or indirectly, 75 percent or more of the voting power or value of the beneficial interests or shares of such trust; or

(D) Any qualified foreign entity, meaning a corporation, trust, association or partnership organized outside the laws of the United States and which satisfies the following criteria:

(i) At least 75 percent of the entity's total asset value at the close of its taxable year is represented by real estate assets, as defined at Section 856(c)(5)(B) of the Internal Revenue Code of 1986, as amended, thereby including shares or certificates of beneficial interest in any real estate investment trust, cash and cash equivalents, and U.S. Government securities;

(ii) The entity is not subject to tax on amounts distributed to its beneficial owners, or is exempt from entity-level taxation;

(iii) The entity distributes at least 85 percent of its taxable income, as computed in the jurisdiction in which it is organized, to the holders of its shares or certificates of beneficial interest on an annual basis;

(iv) Not more than 10 percent of the voting power or value in such entity is held directly or indirectly or constructively by a single entity or individual, or the shares or beneficial interests of such entity are regularly traded on an established securities market; and

(v) The entity is organized in a country which has a tax treaty with the United States.

(2) 'Captive real estate investment trust' means any real estate investment trust the shares or beneficial interests of which are not regularly traded on an established securities market, and more than 50 percent of the voting power or value of the beneficial interests or shares of which are owned or controlled, directly or indirectly, or constructively, by a single entity that is:

(A) Treated as an association taxable as a corporation under the Internal Revenue Code of 1986, as amended; and

(B) Not exempt from federal income tax pursuant to the provisions of Section 501(a) of the Internal Revenue Code of 1986, as amended.

(3) 'Dividends paid deduction' means the deduction for dividends paid which is allowed pursuant to Sections 561 through 565 and Sections 856 through 859 of the Internal Revenue Code of 1986, as amended.

(4) 'Real estate investment trust' means an entity that has elected such status for federal income tax purposes and meets the requirements of Section 856 of the Internal Revenue Code of 1986, as amended.

(5) 'Related member' means the same as is defined in Code Section 48-7-28.3.

(b) For purposes of computing Georgia taxable net income under Code Sections 48-7-21 and 48-7-27, a taxpayer shall add back all expenses and costs directly or indirectly paid, accrued, or incurred to a captive real estate investment trust. Such expenses and costs shall be added back before the income is apportioned or allocated as provided by Code Section 48-7-31.

(c) The amount of the adjustment required by subsection (b) of this Code section shall be reduced, but not below zero, to the extent the corresponding expenses and costs received as income by the captive real estate investment trust are reduced by expenses paid, accrued or incurred to persons that are not related members, and such expenses shall be allowed in computing the captive real estate investment trust's federal taxable income.

(d) The commissioner shall have the authority to reverse in whole or in part the adjustments required in subsection (b) of this Code section when the taxpayer and the commissioner agree in writing to the application or use of an alternative method of apportionment under subparagraph (d)(2)(C) of Code Section 48-7-31, Code Section 48-7-35, or Code Section 48-7-31.1. Nothing in this Code section shall be construed to limit or negate the commissioner's authority otherwise to enter into agreements and compromises otherwise allowed by law.

(e)(1) For purposes of this subsection, the term:

(A) 'Allocated or apportioned, or both' does not mean the amount of income that is subject to allocation or apportionment, or both. Rather it means the amount that is arrived at after applying the allocation and apportionment rules of a state as defined in subparagraph (B) of this paragraph. A tax or the portion of a tax, which is or would be imposed regardless of the amount of the income, shall not be considered to be a tax on or measured by the income of the captive real estate investment trust.

(B) 'State' means a state in the United States of America, including the District of Columbia, but does not include those states under whose laws the taxpayer files with the captive real estate investment trust, or the captive real estate investment trust files with another related member, a combined income tax report or return, a consolidated income tax report or return, or any other report or return where such report or return is due because of the imposition of a tax on, or measured by, income and where such

combined income tax report or return, consolidated income tax report or return, or other report or return results in the elimination of the tax effects from transactions directly or indirectly between the taxpayer and the captive real estate investment trust or between the captive real estate investment trust and another related member.

(2) The amount of the adjustment required by subsection (b) of this Code section shall be reduced, but not below zero, to the extent the corresponding expenses and costs are received as income in an arm's length transaction by the captive real estate investment trust and to the extent such income is allocated or apportioned, or both, to and taxed by Georgia or another state that imposes a tax on or measured by the income of the captive real estate investment trust. For purposes of this paragraph, the corresponding expenses and costs shall not be considered to have been received as income by the captive real estate investment trust to the extent such income is reduced, in computing the income of the captive real estate investment trust in Georgia or another state, by the dividends paid deduction or by expenses paid, accrued, or incurred to persons that are not related members, or both.

(3) In claiming the exception allowed by this subsection, the taxpayer shall disclose on its return, with respect to the captive real estate investment trust, the name, the federal identification number, the name of each state, the amount of the expenses and costs allocated or apportioned to and taxed by each state, and such other information as the commissioner may prescribe.

(f) Nothing in this Code section shall require a taxpayer to add to its Georgia taxable net income more than once any amount of expenses and costs that the taxpayer pays, accrues, or incurs to a captive real estate investment trust.

(g) Nothing in this Code section shall be construed to limit or negate the commissioner's authority to make adjustments under Code Section 48-7-58.

(h) Except as otherwise provided in this Code section, a real estate investment trust that is intended to be regularly traded on an established securities market, and that satisfies the requirements of Section 856(a)(5) and (6) of the Internal Revenue Code of 1986, as amended, by reason of Section 856(h)(2) of the Internal Revenue Code of 1986, as amended, shall not be deemed a captive real estate investment trust within the meaning of this Code section.

(i) A real estate investment trust that does not become regularly traded on an established securities market within one year of the date on which it first becomes a real estate investment trust shall be deemed not to have been regularly traded on an established securities market, retroactive to the date it first became a real estate investment trust. For purposes of this subsection, a real estate investment trust becomes a real estate investment trust on the first day that it has both met the requirements of Section 856 of the Internal

Revenue Code of 1986, as amended, and has elected to be treated as a real estate investment trust pursuant to Section 856(c)(1) of the Internal Revenue Code of 1986, as amended,.

(j) For purposes of this Code section, the constructive ownership rules of Section 318(a) of the Internal Revenue Code of 1986, as amended, as modified by Section 856(d)(5) of the Internal Revenue Code of 1986, as amended, shall apply in determining the ownership of stock, assets, or net profits of any person.

(k) The adjustment required by this Code section shall apply to a corporation that files a separate return with Georgia and to the separate taxable income computation of each member of a Georgia consolidated return.

(l) In addition to other penalties imposed by this title, the penalty for failure to make the adjustment required by this Code section shall be 10 percent of the additional tax that results because of this Code section. The commissioner may waive this penalty pursuant to the provisions of Code Section 48-2-43.

(m) The commissioner is authorized to prescribe forms and promulgate rules and regulations deemed necessary in order to effectuate this Code section."

SECTION 4.

This Act shall become effective upon its approval by the Governor or upon its becoming law without such approval and shall be applicable to all taxable years beginning on or after January 1, 2010.

SECTION 5.

All laws and parts of laws in conflict with this Act are repealed.